INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statement	2
Argument	3
Conclusion	10

CITATIONS

Cases:

Oriolo v. United States, 324 U. S. 824	10
Pierce v. United States, 252 U. S. 239	3
United States v. *Atkinson*, 297 U. S. 157	3, 10

Statute:

18 U. S. C. 409	2

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In the Supreme Court of the United States

OCTOBER TERM, 1946

No. 219

LINDSAY POWELL, PETITIONER

v.

THE UNITED STATES OF AMERICA

No. 220

RUSHELL BAILEY, PETITIONER

v.

THE UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The majority and dissenting opinions in the circuit court of appeals (R. 55–57, 70) have not yet been reported.

JURISDICTION

The judgment of the circuit court of appeals was entered May 9, 1946 (R. 58) and a petition for rehearing was denied May 24, 1946 (R. 70). The petition for a writ of certiorari was filed

June 20, 1946. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rules 37 (b) (2) and 45 (a) of the Federal Rules of Criminal Procedure, effective March 21, 1946.

QUESTION PRESENTED

Whether petitioners' convictions should be reversed for insufficiency of evidence.

STATEMENT

An indictment in one count was returned in the United States District Court for the Southern District of Indiana charging petitioners with the purchase of eight cases of Sunnybrook whiskey that had been stolen from an interstate shipment, knowing the whiskey had been stolen (18 U. S. C. 409)[1] (R. 2). After a jury trial, at which they were represented by counsel, petitioners were found guilty as charged (R. 25). Powell was sentenced to imprisonment for four years and Bailey to imprisonment for three years (R. 26). On appeal to the Circuit Court of Appeals for the Seventh Circuit the convictions were affirmed (R. 55–57), one judge dissenting as to affirmance of Bailey's conviction (R. 57).

The evidence for the Government is summarized in the Argument, *infra*.

[1] This statute penalizes "Whoever * * * shall buy or receive or have in his possession any * * * goods or chattels [stolen from an interstate shipment], knowing the same to have been stolen."

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ARGUMENT

Relying principally upon *United States* v. *Atkinson*, 297 U. S. 157,[2] petitioners, who failed to challenge the sufficiency of the evidence at any stage of the proceedings in the trial court, contend here, as they did in the circuit court of appeals, that their convictions should be reversed because "there was such a lack of evidence in this cause as to make" their convictions "a miscarriage of justice" (Pet. 3, 8–9, 12, 16, 20–22). This contention has no merit, at least with respect to petitioner Powell.

An examination of the entire record reveals the following substantial[3] uncontradicted evidence for the Government:[4] Eight cases of Sunnybrook whiskey (fifths) were stolen from an interstate shipment, at Evansville, Indiana, by Elvis Morton, George Stearsman, and Mike Jennings, at about

[2] "In exceptional circumstances, especially in criminal cases, appellate courts, in the public interest, may, of their own motion, notice errors to which no exception has been taken, if the errors are obvious, or if they otherwise seriously affect the fairness, integrity or public reputation of judicial proceedings." *United States* v. *Atkinson*, 297 U. S. 157, 160.

[3] The question is not whether the Government's evidence showed guilt beyond a reasonable doubt (See Pet. 13), but whether there was substantial evidence to support the verdict, it being for the jury to determine whether "the effect of the evidence was such as to overcome any reasonable doubt of guilt." *Pierce* v. *United States*, 252 U. S. 239, 251–252.

[4] Petitioners did not testify and offered no evidence in their defense.

midnight July 14, 1945. Stearsman knew petitioner Powell had been a bootlegger, and so, with Jennings and Morton, he took the whiskey, in a small truck, to 251 Lincoln Road, Evansville, where the two petitioners operated a "shining parlor," called the Superior Smoke Shop, in the rear room of which they had a bar where they sold drinks. Stearsman found petitioner Powell seated in a car parked in front of the smoke shop, and "gave him some kind of a story" about the whiskey and asked Powell if he would buy it. He "didn't tell [Powell] there was anything wrong with this whiskey or it was hot or not properly stamped," but did tell Powell that he "didn't know whether it had stamps or not on it." They agreed on a price of $40 per case,[5] Powell saying, "he couldn't handle it that night but to bring it the next morning." At about 5:30 the next morning (Sunday) Stearsman and Morton again took the whiskey to petitioners' place of business and, following Powell's instructions, drove the truck around to the alley in back of the smoke shop where Powell, Stearsman, Morton, and one Buchanan unloaded the whiskey. Morton then drove the truck around to the front, while Stearsman went inside to the bar where "there were a lot of people * * * having drinks," and where Powell paid Stearsman $320 in cash. During the

[5] "The wholesale price on fifths, twelve to a case, of Sunnybrook Whiskey would be somewhere between $45.00 and $50.00", possibly a little lower, plus $9 per case for Indiana State tax (R. 14, 15).

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unloading of the whiskey petitioner Bailey was inside, in the bar. After the whiskey was unloaded, Buchanan went back inside to the room next to the bar, where a crap game was in progress. There was some conversation about the bargain petitioner Powell had gotten when it was discovered that each of the eight cases contained 15 bottles (fifths) instead of the expected 12 bottles. Within the next few weeks Stearsman tried to sell Powell some more stolen whiskey. Powell did not take it but gave Stearsman five or six gas stamps to take it out of town and sell it. (R. 5–13.) No state permit had ever been issued to the petitioners singly or jointly, or the smoke shop, to purchase or sell liquors (R. 16).

It is clear, we believe, that this evidence was sufficient to sustain petitioner Powell's conviction. Although there was no evidence that he actually knew the whiskey was stolen,* the circumstances under which it was acquired were sufficient to show that petitioner Powell could not have believed

* The court's charge with respect to this element of the crime was as follows (R. 22–23): "You may further believe from the evidence which seems to be uncontradicted that the merchandise, eight cases of whiskey, were stolen by the three persons named in the indictment.

"If you believe that, and there seems to be no contradiction upon that subject, then you come to the question, and the only question in this case to determine, that is, whether or not these defendants bought and received this whiskey knowing at the time they so bought it that it had theretofore been stolen.

"So the issue is very simple so far as the jury is concerned. I think the attorneys, especially one of the attorneys, in his

otherwise than that he was buying stolen goods. Petitioners had no permit to buy whiskey; they were operating an illicit bar and gambling room behind a "shine parlor" front; the whiskey was offered to Powell shortly after midnight and he agreed to pay $40 per case without even seeing it; and he had it delivered early Sunday morning when it was hardly light, paying in cash a price considerably less than the prevailing wholesale

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argument stated that was the issue in this case, as to whether or not these defendants purchased that whiskey and whether or not at the time they purchased it they knew it was stolen whiskey.

"Circumstantial evidence, ladies and gentlemen, is legal evidence. So you should consider all the circumstances in this case, as well as the oral testimony in determining the guilt or innocence of these defendants. Of course, if the government relies upon circumstantial evidence alone, it then must point so clearly to the guilt of the defendant that no other conclusion can be reached than that of guilt before they can be convicted upon circumstantial evidence, alone.

"Now, what are the circumstances? You heard the evidence in this case. Delivered early Sunday morning, taken to the home of one of these defendants, where it was stored—type of business, they were running—price paid—it is always an item that a jury should consider in a case of this kind, whether a price much less than the real value of the merchandise is paid. That does not necessarily mean that they had knowledge that it was stolen property, but that is just one circumstance along with all the other circumstances in determining whether or not these defendants knew that this property or this merchandise was stolen, if you find from the evidence that they did purchase such merchandise, $40 a case, Sunnybrook whiskey, 15 bottles to the case, which would be even three gallons, as I figure it—the exhibits might indicate they sold by the drink—those are things that you will consider when you go to determining whether or not these defendants are guilty as charged."

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price for a bona fide purchase. The statement (Pet. 18) that aside from proving possession the Government "failed to offer evidence of any other circumstances or facts from which an inference could be drawn that Powell knew this property was stolen" is thus not supported by the record.

We believe, however, that petitioner Bailey's contention that the evidence was insufficient to sustain his conviction is, as stated in the dissenting opinion (R. 57), "well founded." The only evidence tending to connect Bailey with the crime was the testimony of the witness Buchanan who had known both petitioners for several years (R. 5). Referring to petitioners, Buchanan testified on direct examination that (R. 5–6):

> * * * They operate a shining parlor. At that time they were selling drinks. They called it the Superior Smoke Shop. There was a place in the rear that was separate from the Smoke Shop. They had a small bar. That was in the rear. They sold the drinks in the rear. * * *

Referring to what happened Sunday morning, July 15th, Buchanan testified that (R. 6):

> * * * There was a big crowd there and stay around there, and they had a game, and I stayed around there for the game, and along about—I took it to be along about 5:30 or 6:00 o'clock Lindsay [Powell] come by and asked me to come help him. I went and helped him. I went in the back with Lindsay and he told me to come and

help him a little while and I come and helped him. A truck drove up. Bailey was there. A truck drove up in the back, and to the garage, and he said, "Help these boys unload these cartons here," and I told him all right. Bailey was in the bar. And I went ahead on and went on and unfastened the door and helped unload the cartons and unload it right down in the garage, and we got them unloaded and one of the fellows said, "Drive around in front and come in and buy a drink," and we got them unloaded and after we got them unloaded, told me to take some stuff around the house. They went on through where Rushell [Bailey] was and I took the cases and took them on in the house, and I come on back, and I was going to get back in there into the crap game and I come onto the crap game. • • •

On cross examination Buchanan testified that:

When the truck came up there Bailey wasn't on the outside. When the packages were unloaded Mr. Bailey was not there. He was in the bar.

Question: I believe you testified after you unloaded the packages that you went into the bar and that was when you saw Bailey?

Answer: No sir.

Question: When was the first time you saw Bailey?

Answer: I said after I unloaded the whiskey off the truck, down into the garage, Lindsay and one of the white fellows went

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inside. Lindsay told me to take the whiskey around to his house and the other boy with the truck went around in front so he told him to go around in front.

At that time Bailey was inside. I couldn't tell you where Bailey was when the packages were unloaded. I didn't see him.

Question: And these conversations that you referred to, Mr. Bailey wasn't there at any of those conversations, was he?

Answer: Bailey wasn't out there at all when we was unloading whiskey." (R. 7–8.)

No other evidence as to Bailey's connection with the crime was admitted.[7] Stearsman and Morton, who delivered the whiskey, could not even identify Bailey as having been at the smoke shop.[8]

[7] The trial court held inadmissible, as incompetent, the statements made by petitioners after they were taken into custody (R. 19), and instructed the jury to disregard this evidence (R. 23). Consequently, the testimony of Huff, police officer, that Bailey, after his arrest, admitted he and Powell had bought the whiskey from Stearsman and Morton for $320, and that Bailey showed the officers where to find some of the empty and broken bottles in the ash pit behind the smoke shop (R. 17–19), may not be relied upon to show Bailey's guilt.

[8] Morton: "I never saw Bailey until at the police station. Never saw him that [Sunday] morning" (R. 9).

Stearsman: "I would not know if Bailey was there, to tell the truth, whether he was" (R. 11). "I didn't see Rushell Bailey that night. I might have next morning. * * * If I did I don't know it" (R. 12). "Bailey could have been there but I couldn't say whether he was or not" (R. 13).

Since there was no substantial evidence that Bailey knew the whiskey was stolen, or even that he participated in its purchase, we believe that the trial court should have directed a verdict of acquittal as to him, and that therefore the circuit court of appeals erred in refusing to reverse his conviction. Cf. *United States* v. *Atkinson*, 297 U. S. 157, 160 (see fn. 2, p. 3, *supra*).

CONCLUSION

For the reasons stated we respectfully submit that as to Powell the petition for a writ of certiorari should be denied, and that as to Bailey the petition for a writ of certiorari should be granted and the judgment of the court below reversed. We think this may appropriately be done as to Bailey without further briefs or argument since the record is not voluminous and the issue is narrow. Cf. *Oriolo* v. *United States*, 324 U. S. 824.

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